Office-Supreme Court, U.S.
FILED
JUL 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,
Appellants,

versus

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM OR DISMISS

1210 First National Bank Tower
Atlanta, Georgia 30383
404/658-9977

DAVID F. WALBERT
Counsel of Record for Appellees

133 Luckie Street, N.W.
Eighth Floor
Atlanta, Georgia 30303
404/656-6021

ROBERT W. CULLEN

52 Fairlie Street, N.W.
Atlanta, Georgia 30303

LAUGHLIN MCDONALD
CHRISTOPHER COATES

No. 80-2100

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

QUENTIN ROGERS, et al.,
Appellants,

versus

HERMAN LODGE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM OR DISMISS

Appellees, pursuant to Rule 16, hereby move that the final judgment and decree of the Court of Appeals be affirmed, or that this appeal be dismissed, on the grounds that: (1) the questions raised are so insubstantial that further argument is unwarranted; and (2) appellants are seeking for the first time to challenge findings that were not challenged in the Court of Appeals.

TABLE OF CONTENTS

	Page
MOTION TO AFFIRM OR DISMISS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	3
The Court of Appeals and the District Court Complied Fully With *City of Mobile v. Bolden*	3
The Other Questions Raised by Appellants are not Substantial	18
CONCLUSION	26

TABLE OF AUTHORITIES

Cases	Page
Arlington Heights, Village of v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	3
Baker v. Carr, 369 U.S. 186 (1962)	12
Castaneda v. Partida, 430 U.S. 482 (1977)	6
Columbus Bd. of Ed. v. Penick, 433 U.S. 449 (1979)	6
Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 (1979)	6
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949)	7
Keyes v. School Dist. No. 1, Denver, 413 U.S. 189 (1973)	6
Lodge v. Buxton, 639 F. 2d 1358 (5th Cir. 1981)	*passim*
Lucas v. Colorado General Assembly, 377 U.S. 713 (1964)	12
McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981)	19
Mobile, City of v. Bolden, 446 U.S. 55 (1980)	*passim*
Smith v. Allwright, 321 U.S. 649 (1944)	16

Page

Washington v. Davis, 426 U.S. 229 (1976) .. 3

White v. Regester, 412 U.S. 755 (1973) 17

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) 4, 5, 19, 26

Statutes

Voting Rights Act of 1965 ..... 13, 20

Georgia Laws of 1958, pp. 269, 279 20

Georgia Code § 34-620 24

STATEMENT OF THE CASE

The plaintiffs in this case are black registered voters who reside in Burke County, Georgia. They filed this action to challenge the legality of at-large, county-wide elections for the five Burke County Commissioners. Since Reconstruction, no Blacks had served in elected offices from Burke County, and the plaintiffs claimed that at-large elections were currently maintained as one in a long sequence of devices used to exclude Blacks from the political process. At trial, the parties introduced voluminous evidence and the trial court found in favor of the plaintiffs on all relevant factual issues. The court found that at-large elections were being maintained for discriminatory purposes in violation of the fourteenth amendment. The Court of Appeals affirmed the District Court's opinion in all regards. *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981).

The entire spectrum of official conduct in Burke County was scrutinized by the lower courts, and they concluded that racial discrimination was a controlling motivation that permeated virtually every facet of government action in the County. The evidence showed that the County's Whites, who hold all private and public power in the community, are dedicated to perpetuating the exclusion of Blacks from any meaningful participation in civic and political affairs.

> [T]he county commissioners, acting in their official capacities, have demonstrated such insensitivity to the legitimate rights of the county's Black residents that it can only be explained as a conscious and wilful effort on their part to maintain the invidious

vestiges of discrimination. To find otherwise would be to fly in the face of overwhelming and shocking evidence. 639 F.2d at 1377.

The District Court concluded that the only effective remedy was to require a district election scheme that would allow Blacks some access to the political process and possibly elective office. No lesser remedy would have been meaningful, a conclusion the Court of Appeals soundly affirmed:

> [T]he remedy ordered is not only permitted, but, under the facts presented, it may be required. The picture the plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County. The discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector. The situation is not susceptible to isolated remedy. While this Court is aware of its inability to alter private conduct, we are equally aware of our duty to prevent public officials from manipulating that conduct within the context of public elections for constitutionally proscribed purposes. 639 F.2d at 1381.

In ordering district elections, the District Court merely required that election lines be drawn differently. The relief did not in any way affect the nature or operation of the county commission, nor was the responsibility of any elected or other official affected in the slightest. 639 F.2d at 1381. Thus, the relief here was much less intrusive than the relief that had been ordered in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), where the District Court substituted an entirely new form of government.

ARGUMENT

I. THE COURT OF APPEALS AND THE DISTRICT COURT COMPLIED FULLY WITH *CITY OF MOBILE v. BOLDEN.*

Both the District Court and the Court of Appeals carefully followed this Court's equal protection decisions. In the unreported District Court order, Judge Alaimo concluded that at-large elections were being maintained in Burke County for the purpose of discrimination. That at-large elections had the effect of discriminating against Blacks was obvious and barely contested by the defendants. The further finding of invidious, purposeful discrimination was decided on the basis of this Court's holdings in *Washington v. Davis*, 426 U.S. 29 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Appellants complain that the District Court's judgment preceded the *Mobile* decision, but there certainly is no need for trial court reconsideration here since the Court of Appeals carefully considered and followed everything said by this Court in *Mobile*. The Court of Appeals specifically rejected the necessity of a post-*Bolden* remand:

> A court that correctly anticipated how the intent requirement in past cases would be applied to voting dilution cases, as in *Bolden*, could correctly interpret and apply the law, without the benefit of [*Bolden*]. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case . . . . It is clear . . . that Judge Alaimo employed the constitutionally

required standard in his evaluation of the present case. 639 F.2d at 1375-76.

The *Mobile* opinions of Justices Blackmun, White, Marshall and Brennan are clearly satisfied in this case, which contains evidence and findings far beyond that in *Mobile*. And the plurality opinion — which requires more proof of invidious purposes — is satisfied since the plurality's approach is precisely the approach followed below. Judge Alaimo discussed and considered *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) kinds of evidence, as he is authorized to do under *Mobile*, but he also made independent findings of intentional discrimination that were based on the entire record. After carefully reviewing the record and Judge Alaimo's opinion, the Fifth Circuit concluded that:

> [Judge Alaimo's] order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the County's Black residents to meaningfully participate therein. 639 F.2d at 1380.

The Court of Appeals itself independently reviewed the evidence and agreed that purposeful, intentional discrimination had been proved. Indeed, the Court characterized the evidence of intentional discrimination as "overwhelming." 639 F.2d at 1380. In arriving at this conclusion, the Court followed the *Mobile* plurality and rejected the *Zimmer* test as a categorical way of determining the constitutionality of at-large elections. In rejecting *Zimmer*, the *Mobile* plurality held that the trial court must focus on the ultimate factual issue — what is the *purpose* that

motivates the adoption or retention of the scheme? The Court of Appeals plainly recognized this requirement and the limits of *Zimmer* evidence:

> Though four Justices were satisfied with the *Zimmer* criteria [in *Bolden*], five Justices clearly rejected the exclusive use of those criteria for inferring purpose or intent. We conclude that they rejected the use of the *Zimmer* criteria to the extent that [the Fifth Circuit], in *Bolden, presumed* the existence of a discriminatory purpose from the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. 639 F.2d at 1373.

At the same time, the Court of Appeals held that the *Zimmer* criteria might have some evidentiary relevance in determining purpose, as the *Mobile* plurality recognized, but that other criteria and evidence were very important and must be considered as well. The Court held that the *Zimmer* criteria may provide some evidence of intent, but they were "not dispositive on the question of intent." *Id.* at 1375. That is precisely the plurality's view in *Mobile*. 446 U.S. at 73. The Court of Appeals also followed the plurality's view and held that the *Zimmer* factors were relevant only insofar as they might elucidate the basic question of purpose. 639 F.2d at 1375.

Thus, while the appellants' *Jurisdictional Statement* reads as if the Court of Appeals wilfully disregarded *Mobile*, appellants ignore the conscientious effort of the Court to implement the *Mobile* ruling. The lower courts here considered the extensive evidence, and con-

cluded that at-large elections were maintained specifically for invidious purposes in Burke County. The trial judge himself, of course, was in the best position to make this determination. He saw and heard the dozens of live witnesses and reviewed the hundreds of exhibits, and he is best able to determine what weight and credibility, if any, each one was entitled to.

The only real holding here that may not have been stated explicitly in *Mobile* is that "smoking gun" evidence is not a prerequisite to finding purposeful electoral discrimination. Instead, the lower courts relied on a tremendous amount of other evidence; an assessment by the trial judge of the credibility of the various witnesses, including the defendants; and thorough testimony concerning any other, nondiscriminatory purpose that the election scheme might have served.

While the *Mobile* case itself may not explicitly hold that such evidence is sufficient to prove purposeful discrimination, that is clearly the position of this Court. Circumstantial evidence has repeatedly been deemed sufficient to support findings of purposeful discrimination in other contexts. *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Ed. v. Penick*, 433 U.S. 449 (1979); *Castaneda v. Partida*, 430 U.S. 482 (1977); *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973). Only if this Court were prepared to reject this position and require absolute, admission-type proof of intent, would there be any point of law that could warrant full argument in this case. Obviously, this Court would not adopt such an extreme and absurd rule. As the Court of Appeals stated:

> [A]ssuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so Blacks won't get to participate." . . . Quite simply, there will be no "smoking gun." 639 F.2d at 1363 n. 8.

The *Mobile* plurality says nearly as much since it recognizes the probative value of evidence that is far less than the "smoking gun" variety, including impact evidence, *Zimmer* evidence, etc.

The appellants' only real complaint here is with the facts that have been found against them, but as the Court of Appeals concluded after reviewing the record:

> Judge Alaimo's evaluation of all the relevant evidence was thorough and evenhanded. *His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact, virtually mandated by the overwhelming proof. Id.* at 1380 (emphasis added).

This Court should not review factual determinations concurred in by two federal courts unless there has been "a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). No such error can exist where the evidence is "overwhelming." And no such complaint should even be entertained here since not a single finding of fact was even challenged as clearly erroneous in defendants' main brief in the Court of Appeals. *See Brief of Defendants-Appellants* (filed June 5, 1980)

Nevertheless, it may be of some assistance to this Court for appellees to identify some of the evidence relied on below in finding invidious and purposeful discrimination. In assessing any of this evidence, one must keep in mind, as background, that the plaintiffs proved that racial discrimination pervades Burke County. The evidence showed that everything possible has been done to exclude Blacks from public life in Burke County. Based on all of the testimony, the District Court characterized the attitudes of the defendants as follows:

> The Court concludes that defendants are heedless of the needs of the Black community, whether it be in the Blacks' concern for the quality of education or the quantity of paving. The sluggishness with which the Commission moves in response to Black demands is well-nigh the equivalent of callous indifference to that class which has fallen heir to the evil of two centuries of discrimination. The Commissioners' lack of responsiveness is merely an extension of a culture which could view the vestiges of slavery with unseeing eyes. (J.S. at 95a)

The Court found that "the County Commissioners, as an elected body, have acted with an insensitivity to the particularized needs of the black community amounting to unresponsiveness." (J.S. at 77a) And the Court also concluded "that the insensitivity of defendants to the needs of the plaintiff class exists because of invidious racial motivations." (J.S. at 82a)

The Court of Appeals independently reviewed the evidence of the defendants' dealings with Blacks and came to the same conclusion. Commenting on certain

examples of blatant racial discrimination, the Court stated that:

> Our review of the evidence in this case leads us to the conclusion that these patent examples of discriminatory treatment by Burke's county commission typify the treatment received by Blacks in Burke County in every interaction they have had with the White controlled bureaucracy. 639 F.2d at 1377 n. 37.

Simply put, plaintiffs proved that Burke County continues to be dominated by a firm commitment to white supremacy. Whatever degree of racial progress there has been in the County has invariably been the result of federal compulsion. The testimony revealed no instance where Whites have voluntarily admitted Blacks to any facet of public or private life in Burke County, whether it be the school system, public accommodations, employment opportunities, or the political process. This pervasive pattern of racial exclusion certainly provides some evidence that the at-large system also serves an exclusionary purpose. Indeed, it would stand reason on its head to suggest that white people would share ultimate political power in the County with Blacks, when Whites have refused to share with Blacks much lesser aspects of public and private life in the County.[1]

The defendants were not even particularly coy about

---

[1] Several witnesses testified to the concerted efforts to keep Blacks from political life. One witness described Burke's Whites as having "tremendous horror of Blacks coming into power there." (T. Vol. I at 115) Another testified that politics was still considered a "White man's game" from which Blacks should be excluded. *Id.* at 551-52.

their attitudes. Several admitted their adherence to segregation (T. Vol. I at 257-59, 264-66, 279), although the chairman of the county commission ventured the opinion that desegregation might ultimately be accepted in Burke County in another thirty years. (T. Vol. I at 378) Another commissioner testified that Blacks are still openly called "niggers" in county commission meetings. (T. Vol. I at 242-44) The "colored" and "white" signs are still fully visible on the courthouse restroom doors, and the "nigger hook" still remains in the courthouse as a reminder of white attitudes towards Blacks. (J.S. at 77a-78a, 94a) Only a block away from the courthouse, the white laundromat is as segregated today as it was twenty years ago (J.S. at 77a, 94a), a fact that no county commissioner has ever found objectionable. Indeed, a Black witness testified that she had been thrown out of this laundromat just a few days before trial. (T. Vol. I at 332-34)

No county commissioner admitted that the at-large election scheme was being purposefully used to exclude Blacks. But they all did testify to the traditional White Supremacist rationalization for the exclusion of Blacks from politics and elected office — "they're just not interested." (*E.g.*, T. Vol. I at 308-09) In light of the compelling evidence that Blacks are excluded from the political process in Burke County by the at-large election scheme, one can only be amazed at the temerity of defendants to justify that exclusion on such a flimsy basis.

Overall, plaintiffs provided the courts with a compelling picture of the intense hostility of Burke County's white political powers towards racial advancement or equal treatment of black citizens. The District Court

was shocked at the extent to which the county commissioners refused to allow Blacks any role in Burke County's public and political life.

> It is the Courts' impression that Blacks of Burke County desire, and desperately need, to play a meaningful role in their local government; to be able to work within the system, rather than to be forced to attack it from without. The commissioners have been singularly unresponsive to this need. (J.S. at 78a)

Blacks "have been forced outside the local government." (J.S. at 81a) Because they are excluded from the political process, Blacks have been left only two possible avenues for redress — the federal courts and the streets. *Id.*

This powerful evidence would be enough in its own right to uphold the lower courts' findings that at-large elections were intentionally used as a means to limit black participation in the electoral process, but this evidence hardly stands alone. One of the County's preeminent white political figures was called as a defense witness and asked to compare district and at-large voting for Burke County. (T. Vol. III at 97-99) He acknowledged that the "only reason" he could think of to distinguish the two was race and a policy of preferring one race over the other. *Id.* at 101-02.

Indeed, the defendants themselves could offer no serious alternative purpose that was served by at-large elections, other than racial exclusion. When questioned about the drawing of district election lines, the county commissioners saw no factors that would impede the

establishment of such a system. Each just emphasized that any districts should have equal populations. (T. Vol. I at 422-24, 460-62) Appellants' *Jurisdictional Statement* urges no other purpose in this Court, so the appellants are now foreclosed from even suggesting that some non-racial purpose justifies the use of at-large elections.[2]

More importantly, the actual evidence here simply refuted any showing of another purpose. Based on all of the evidence, the lower courts found only one purpose behind the utilization of at-large elections, and that was race. Both the plaintiffs and defendants tendered district election plans which showed that there was no difficulty in creating such a system in Burke County. Judge Alaimo specifically found that there would be little or no voter confusion with a district plan (J.S. at 98a), and he concluded that it was so simple to institute district elections that it could be done and elections conducted under the plan in just a few weeks time. He noted as well that the Burke County Democratic Party elected its governing board from districts (pursuant to the command of the State Democratic Party), and that district scheme created

---

[2] Even in the Court of Appeals, the appellants' assertion of non-racial purposes was thinly transparent. The suggested purposes were: (1) to avoid alleged voter confusion and complications; and (2) to avoid reapportionment after a census. *Defendants' Supplemental Brief* at 12. This latter rationale is patently unacceptable. It would mean that *Baker v. Carr*, 369 U.S. 186 (1962), is no longer good law if the mere avoidance of reapportionment would be a sufficient "purpose" to retain an election system that is otherwise unconstitutional. And the former reason is even stranger since district election systems are normally considered to be less confusing to the voter, not more, as this Court has pointed out. *Lucas v. Colorado General Assembly*, 377 U.S. 713, 731 (1964).

no problem whatsoever. (J.S. at 91a) Judge Alaimo also found that other local governments are elected in Georgia by district and function perfectly well. *Id.*[3]

All the evidence of intent and motive in this case supports the lower courts' conclusion that race is the purpose behind county-wide elections. This conclusion is further buttressed by the evidence of defendants' direct efforts to keep Blacks from participating in the County's political affairs. Since enactment of the Voting Rights Act of 1965, defendants have continued to do what they could to minimize Black voter registration. Burke County is very large, over 800 square miles, yet the county commissioners maintained only one registration site in the whole County. The Court of Appeals noted that this kind of "overt conduct" that was used to minimize Black registration was "taking place even at the time the present lawsuit was filed." 639 F.2d at 1377 n. 38.

Defendants have also tried to keep Blacks out of public affairs by refusing to appoint them to the many public agencies and commissions which exercise a tremendous amount of governmental authority in the County. (J.S. at 78a) The District Court went on to

---

[3] It should be noted also that the purpose issue here is different than in *Mobile*. In *Mobile*, the plaintiffs sought to replace the executive commission government with an entirely different form of government, one with a mayor and council. To justify such relief, the plaintiffs there had to prove that the very form of government was adopted or maintained for invidious purposes. Here, the plaintiffs merely challenged the location of the election district lines as discriminatory, which is inherently easier to prove. Thus, while the *Mobile* evidentiary requirements are satisfied in this case, a somewhat lower level of proof might even be sufficient because the essential form of government is not at issue here.

find that "the Commissioners' failure to appoint Blacks to the committees and boards in sufficient numbers, or a meaningful fashion, is without doubt an unfair denial of access to input into the political process." (J.S. at 89a) Since the defendants do not believe that Blacks are fit to serve on these appointed governmental bodies, surely the defendants do not consider them fit to enjoy the highest elected office in the County, that of county commissioner. The exclusion of Blacks from these appointed positions was explained solely on the basis of race. Similarly, the exclusion of Blacks from the county commission, through the use of the at-large election system, was explained at trial on no ground other than race.

This is just a small sample of the evidence of the efforts and desire to exclude Blacks from public and private affairs. There has been a concerted and uninterrupted pattern of official behavior designed to eliminate Blacks from all walks of life, including the political process. As the lower courts concluded, there is far more than enough evidence to find that the continued use of at-large elections is racially motivated.

Completing this tragic picture of fierce official racism is the extensive evidence the lower courts discussed concerning the exclusion of Blacks from the political process through a variety of means that operate in connection with the at-large system. This further evidence is relevant in at least two ways. It provides additional circumstantial evidence that buttresses other inferences as to the invidious purposes underlying at-large elections. And secondly, as the Court of Appeals reasoned, this kind of evidence shows how

easy it is in Burke County to use at-large elections specifically in order to discriminate. 639 F.2d at 1379. This enhanced possibility of discrimination must be kept in mind when the ultimate question of purpose is decided by a court.

For example, the lower courts noted the great socioeconomic disparity between Blacks and Whites in Burke County.[4] This disparity is itself largely a result of slavery and past purposeful discrimination, 639 F.2d at 1379 & n. 46, an obvious fact admitted by the defendants' own expert. (Robinson Depo. at 42) (J.S. at 83a) As to educational discrimination and disparities, the District Court found that "the unbroken history of an inferior formal education has had and does now have a strong tendency to preclude Blacks' effective participation in the political process." (J.S.

---

[4] The appellants err when they argue that socioeconomics are irrelevant to this case. First of all, the lower courts did not conclude that a disadvantaged group is "entitle[d] . . . to some special dispensation in the area of voting rights." (J.S. at 20) Secondly, appellants ignore the findings that past purposeful discrimination has largely caused the socioeconomic disparities between Blacks and Whites in Burke County. Third, one must again remember that the "ease of discrimination" is a significant point. It is simply easier to use at-large elections to discriminate against Blacks in Burke County than it might be in a county where Blacks enjoy relative socioeconomic parity with Whites.

Similarly, appellants err in rejecting the relevance of discrimination by other government bodies, such as the school board. The lower courts did not "impute" unconstitutional discrimination from one body to another, as appellants allege. (J.S. at 25-26) The purposeful discrimination in the schools was found to directly impact on the ability of Blacks to participate equally in the electoral process (J.S. at 84a-85a, 88a-89a, 95a-96a), a fact ignored by appellants. And these facts again provide some degree of circumstantial evidence that supports an inference of intent in the use of at-large elections.

at 84a-85a)

One of the most striking facts that indicates the thorough exclusion of Blacks from the political life of the County is the lily-white Burke County Democratic Party, whose nominees invariably win local elections. The party has hardly changed since this Courts' decision striking down the segregated Democratic Party in 1944. *Smith v. Allwright*, 321 U.S. 649 (1944). Of 24 members on the county governing body of the Democratic Party, only one was Black, 639 F.2d at 1379, and he was an apparent token who had never even been to a party meeting. (T. Vol. I at 438, 532-33)

Nevertheless, appellants still assert that there was "no evidence" to support the finding that Blacks have been "excluded" from the Party. (J.S. at 25) In truth, the Committee operates a self-perpetuating private club with members either appointed to vacancies (T. Vol. I at 437-39), or solicited by the members to run for election, invariably without opposition. (T. Vol. II at 913-14) The Democratic Executive Committee has recently begun publishing formal legal advertisements, pursuant to state party requirements, that announce its elections. But these ads are obviously not designed to give any real public notice of party activities. D. Ex. 17. The local Democratic Party has been completely successful in maintaining virtual secrecy, as indicated by the testimony of one of the County's most active Blacks who had never even heard of the Democratic Committee. (T. Vol. I at 692, 737)

The District Court found that the segregated Democratic Committee plays an important role in local politics. (J.S. at 87a) That should be obvious since

every elected official who was asked at trial testified that he had been a member or officer of the Democratic Committee. (T. Vol. I at 437-39, 474, 532; Vol. II at 880; Vol. III at 98-99) Thus, whatever formal power the Committee may enjoy, it is certainly tremendously influential in determining who is elected to office. It is instructive to compare these facts to those found sufficient to prove purposeful discrimination by this Court in *White v. Regester*, 412 U.S. 755 (1973). The "slating" relied on in Dallas County was extremely mild by comparison to the kind of racial exclusion that exists in Burke County.[5]

The pervasive segregation in Burke County, which is a direct consequence of past purposeful discrimination, further undercuts the ability of Blacks to participate in politics. The Court of Appeals noted "that person-to-person relations, necessary to effective campaigning in a rural county, [are] virtually impossible on an interracial basis [in Burke County] because of the deep-rooted discrimination by Whites against Blacks." 639 F.2d at 1379.

Other official mechanisms have been used to eliminate Blacks from Burke County's public life. The Court noted that Blacks had been excluded from juries until a court order was entered one year before the trial of this case. (J.S. at 75a) And Blacks were un-

[5] In Dallas County, like here, anyone could legally qualify to run in the Democratic Primary. Blacks were found to be unconstitutionally excluded from the political process in Dallas County because a white-controlled civic organization had substantial political clout in the County. The degree of exclusion here is markedly greater since Blacks are excluded from the Democratic Party itself, rather than from some private civic organization.

constitutionally excluded from elections in the city of Waynesboro, the seat of government in Burke County, until a reapportionment order was entered recently by the District Court. 639 F.2d at 1378 n. 42. The District Court also noticed the many Georgia laws that had an expressly racial purpose and were passed by the Georgia General Assembly in the relatively recent past. (J.S. at 76a)

Finally, the lower courts noted that there were certain formal factors that, although possibly legitimate in their own right, "enhanced" the ability of the defendants to manipulate at-large elections for the purpose of excluding Blacks. 639 F.2d at 1379-80. Among these factors were the majority vote requirement and the numbered post requirement which ensure that the white voting majority will control the election of every single county commissioner. Interestingly, these mechanisms were only added to Georgia's laws in 1964 (J.S. at 65a n. 2), precisely when Blacks were beginning to register to vote and assert their political rights. Even as recently as 1976, when Georgia adopted a new Constitution, the State included literacy, understanding and character tests, which are presently inoperative solely because of the strictures of the federal Voting Rights Act. (J.S. at 86a n. 23)

II. THE OTHER QUESTIONS RAISED BY APPELLANTS ARE NOT SUBSTANTIAL.

First, appellants contend that the Court of Appeals' emphasis on responsiveness was error. (J.S. at 17-19) The Court of Appeals held that unresponsiveness must be proved before plaintiffs can prevail, and it is true

that this additional element was not mentioned as a legal prerequisite by any member of the Court in *Mobile*. But if the Court of Appeals is incorrect, that could only be a ground for complaint by an unsuccessful plaintiff who fails to satisfy this additional burden. The appellants are in no position to complain about this aspect of the ruling below since they could not possibly have been adversely affected by it.

Next, appellants claim that various decisions of the Fifth Circuit are inconsistent. (J.S. at 16-17) Even if true, that would hardly present a substantial question for appeal. But more importantly, this contention shows how appellants have misunderstood the ruling of the Court of Appeals in this case. In *McMillan v. Escambia County*, 638 F.2d 1239, 1247 n. 16 (5th Cir. 1981), the Fifth Circuit held that *Zimmer* was "invalidated by *Mobile*." *McMillan* was decided before *Lodge*, and it shows that the Fifth Circuit fully understands the import of *Mobile*, contrary to appellants' urgings. *Lodge*, like *McMillan*, expressly recognized that the *Zimmer* approach was rejected by the *Mobile* plurality. *Lodge* simply followed *Mobile* and considered *Zimmer* evidence to the extent that it bore a direct evidentiary relation to the intent question.[6]

Finally, appellants challenge certain findings as

---

[6] Appellants also challenged the relief here on the ground that they should have been allowed to enact a new apportionment plan and seek approval under section 5 of the Voting Rights Act. (J.S. at 28) Like most of appellants "issues," this one was never raised on appeal to the Fifth Circuit. *See Brief of Defendants-Appellants, supra.* Moreover, the point is moot. Upon affirmance by this Court, the defendants may comply with the judgment and proceed to enact new district lines and submit them under section 5.

erroneous. (J.S. at 24-25) These contentions are wrong, and they are untimely because no such contentions were properly raised in the Fifth Circuit. *See Brief of Defendants-Appellants*, filed June 5, 1980. One of these contentions is sufficiently serious and oft-repeated, however, that a brief review of the evidence is necessary. Appellants state on at least four occasions that there has never been any difficulty registering or voting in Burke County. (J.S. at 5-6, 20, 21, 24) The evidence to the contrary is overwhelming. First is the simple statistical evidence. Before the Voting Rights Act of 1965, only a few Blacks were registered (J.S. at 71a), and even now only 38% of the registered voters in the County are Black even though voting-age Blacks are about 50% of the population.[7] These facts alone are substantial evidence of the consequences of discrimination. (J.S. at 72a)

Defendants' witnesses admitted that many people who could not pass the literacy test had to take Georgia's infamous "Question and Answer Test." (T. Vol. II at 812-13) This test was obviously designed solely to exclude potential voters since the necessary twenty questions probably could not be answered by anyone in the whole state. *See* Ga. Laws of 1958, pp. 269, 279.

Appellants incorrectly state that several black witnesses who testified never had difficulty registering

---

[7] Appellants incorrectly state that Blacks could "take over" the county because they are a voting age majority. (J.S. at 20) The Black population in the county has dropped continuously from 78% in 1930 to a bare majority today. 639 F.2d at 1361 n. 2, as amended by Order filed April 8, 1981 (J.S. at 60a-61a) (amending population figures to correct typographical errors). There is no longer a Black majority of *voting age* residents.

or voting. In fact, one had to make three or four round trips to Waynesboro (from 60 to 80 miles) to register (T. Vol. I at 71-73, 93-94); another was greeted by the registrar's "nasty tone," *id.* at 152; the registrar only filled out another's card "grudgingly," *id.* at 712-14; and one was told he could not vote because his taxes were not current, *id.* at 741, an edict unauthorized even under Georgia law.

Defendants' own witnesses testified that people were required to make two trips to the courthouse in Waynesboro to register before the Voting Rights Act, one to apply and one to take the test (T. Vol. II at 801-02), even though a deputy registrar could easily have been named to take care of everything in one trip. *Id.* at 809-11. Of course, the two trips were not required of everyone. Even a few Blacks who had influential Whites vouch for them were spared any test or return trip. (T. Vol. I at 312-14, 328-29) The registration process was aptly described as "completely arbitrary" and characterized by "bureaucratic nastiness." *Id.* at 553-54.

To this day, registration has been made as difficult as possible in Georgia as a whole and in Burke County in particular. House-to-house and mobile voter registration are still illegal in Georgia, which obviously impedes registration. *Id.* at 675-77. Yet defendants' own witness, a registration official, admitted there would be no practical difficulty in allowing house-to-house registration drives. (T. Vol. II at 815) The county registrars have never attempted to stimulate registration with any sort of drive or voter education project, *id.* at 815-16, and the officials openly admitted

that the low level of black registration was of no concern to them. (T. Vol. I at 392-98; Vol. II at 780-81, 799, 813)

The 1965 response to the civil rights movement and the Voting Rights Act was less than sanguine, of course. The State adopted the majority vote and numbered post laws that lock in white control. Burke County wanted to eliminate all of its polling places, except the central Waynesboro location, because that would have made it much more difficult for the rural black voters (who had less access to cars than Whites) to get to the poles. The county commissioners sought a legal opinion on this proposal (P. Ex. 11), but the action was blocked by section 5 of the Voting Rights Act.

Even though the County was unable to shut down its polling places, it has been able to keep registration as inaccessible as possible. Registration was allowed only at the courthouse in Waynesboro, although this was very inconvenient for the many Blacks too poor to have transportation.

Black civic organizations had tried for the past decade to get additional registration sites without success. (T. Vol. I at 734 & P. Exs. 100-107) They were even told that it was illegal in Georgia to register anywhere other than the courthouse, and they had to go to the Secretary of State to override that particular instance of deviousness. (T. Vol. I at 734) Of course, maintaining registration only at the courthouse served not only as a geographical deterrent, but also as a strong psychological deterrent. The county courthouse

remains today a prime symbol of white domination. *Id.* at 556-57. "Nothing good" ever happened to a black person there, from a lynching in the past, *id.* at 244, to present discrimination in the administration of justice, *id.* at 750, employment (J.S. at 75a-76a), and all other facets of government conduct (J.S. at 77a-82a), etc. Even the most established and outspoken black civic leader is still haunted by deeply instilled anxieties when he approaches the county courthouse. (T. Vol. I at 676-77)

The refusal to expand registration facilities beyond the courthouse was obviously calculated to reduce black registration, and the scheme has worked well. Defendants' own witness admitted that there was no reason why more sites could not be established (T. Vol. II at 814-15), but none came to pass until after this case was filed and pressure was applied by the District Court.[8] Thus, there was clear, ongoing, overt denial of the right simply to register and cast a ballot when this case was tried. 639 F.2d at 1377 n. 38. Even after the Court forced some liberalization of the registration process, the total number of sites remained woefully inadequate. (T .Vol. I at 557-58, 575-76, 604-06, 743-44)

While the county has exhibited tremendous hostility

---

[8] Appellants claim that they were not really forced to expand registration opportunities. (J.S. at 24) Again, this factual challenge was never presented to the Court of Appeals, and ignores the evidence as well. The most favorable evidence to defendants was that new registration sites were established for a period of four days just before the 1976 election. (T. Vol. II at 958 & P. Ex. 99) But Black people testified that there were no registration materials there and the person supposedly in charge told them he had no idea about registration. (T. Vol. I at 318-21)

to voter registration, it has shown the opposite reaction to voter purging. *See* Ga. Code § 34-620. Although the County turns down Blacks who volunteer to serve as unpaid deputy registrars (T. Vol. I at 724; Vol. II at 954-56), the county eagerly pays people to cull the voting lists whenever possible. *Id.* at 818-20.

Politics remain a "white man's game" in Burke County. Blacks are never appointed as deputy registrars or poll managers and only very rarely have they ever appeared even as lowly poll workers on election day. The whole electoral process is successfully maintained to insure the message of white supremacy. As one witness testified, it does not look any different than it did in 1962. (T. Vol. I at 568)

Finally, one cannot separate these conditions from the pervasive fear among Blacks that has been so ingrained over the years. Fear remains an active force in Burke County that impedes black voter registration and political activity, particularly because of the tenuous economic status of Blacks and the possibility of retaliation. (T. Vol. I at 115, 126, 137, 152-53, 177-78, 244, 551-55, 567-68, 671-73, 675-77)

Many witnesses described the pervasive problem of fear in different ways. In one case, it was the inability of a black civic organization to maintain membership records for fear of retaliation against its members. *Id.* at 670. In another case, it was personal physical threats of bombings and the like, *id.* at 671-73, and in another, it was a shooting episode directed at a young black girl who dared to go to the white public school. *Id.* at 682-84. In another instance, it was the fact that

the black ballot box was always left open until well into the 1960's so Whites could find out who a particular Black was voting for. *Id.* at 689-90. The fear among Blacks that their ballot is not even secret naturally persists to this day. *Id.* at 691-92.

While this is only a small bit of the evidence of difficulties involved in registering and voting, it should be enough to put to rest appellants' claim that Blacks have always voted and registered without difficulty in Burke County.

CONCLUSION

In sum, the evidence of purposeful discrimination in this case was accurately characterized by the Court of Appeals as "overwhelming." The lower courts were faced with an election system that appears neutral on its face, but which is blatantly perverted to abridge the rights of Blacks. In making this finding, the lower courts did not just follow *Zimmer*. They considered a tremendous amount of evidence and found intent based on the entire record, fully in accord with *Mobile*.

The decision of the Court of Appeals should be affirmed without further delay. The precious right to vote has never been fairly extended to Blacks in their more than two hundred year history in Burke County. Not until this Court acts can the lower courts proceed to implement a final remedy and bring some degree of democracy to Blacks who have waited patiently for the same rights given white people for nearly three centuries.

Respectfully submitted,

1210 First National Bank Tower
Atlanta, Georgia 30383
404/658-9977

DAVID F. WALBERT
Counsel of Record for Appellees

133 Luckie Street, N.W.
Eighth Floor
Atlanta, Georgia 30303
404/656-6021

ROBERT W. CULLEN

52 Fairlie Street, N.W.
Atlanta, Georgia 30303

LAUGHLIN MCDONALD
CHRISTOPHER COATES